BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9760
File: 20-161557 Reg: 18086319

CIRCLE K STORES, INC.,
dba Circle K #1161
1396 Palm Avenue,
Wasco, CA 93280,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 6, 2019
Ontario, CA

ISSUED JUNE 21, 2019

Appearances: *Appellant:* Stephen Warren Solomon and Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for Circle K Stores, Inc.,

Respondent: Matthew Gaughan, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Circle K Stores, Inc., doing business as Circle K #1161 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, with all 10 days conditionally stayed, because its clerk sold an alcoholic beverage to a sheriff's department minor decoy, in violation of Business and

[1]The decision of the Department under Government Code section 11517, subdivision (c), dated October 16, 2018, is set forth in the appendix, as is the Proposed Decision of the administrative law judge (ALJ) dated October 29, 2017.

Section 11517, subdivision (c)(2)(E) permits the Department to reject a proposed decision—as it initially did here—and decide the case upon the record, including the transcript of the hearing. After additional briefing by the parties, the Department ultimately adopted the ALJ's Proposed Decision.

Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's type 20, off-sale beer and wine license was issued on August 21, 1984. On January 16, 2018, the Department filed an accusation charging that appellant's clerk, Veronica Bravo (the clerk), sold an alcoholic beverage to 19-year-old James Murphy (the decoy) on June 13, 2017. Although not noted in the accusation, the decoy was working for the Kern County Sheriff's Department at the time.

At the administrative hearing held on April 17, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by Kern County Sheriff's Detectives Corey Stacy and Richard Hudson.

Testimony established that, on June 13, 2017, the decoy entered the licensed premises, walked to the coolers, and selected a 3-pack of Bud Light beer in cans. The decoy took the beer to the register and presented it to the clerk for sale. The clerk asked to see the decoy's ID. The decoy handed her his California driver's license, which she looked at for a few seconds. The decoy's ID had a vertical orientation,[2] showed his correct date of birth, and included a red stripe which read, "AGE 21 IN 2018." The clerk then handed the ID back to the decoy and completed the sale. The decoy left the licensed premises with the beer.

Outside the store, the decoy met with Detectives Stacy and Hudson. The three of them re-entered the store and approached the clerk. While standing five to ten feet away from the clerk, Det. Hudson asked the decoy who sold him the beer. The decoy pointed at the clerk and said, "She did." Det. Hudson explained the situation to the

[2]California Driver's Licenses for individuals 21 years of age or older are displayed in a horizontal format.

clerk and asked her to come out from behind the counter. Det. Hudson then took a picture of the decoy and the clerk together. (Exh. 3.) The clerk told the detectives that she always checks ID and that it was her first day. The clerk was subsequently cited.

On May 11, 2018, the administrative law judge (ALJ) submitted his proposed decision, sustaining the accusation and recommending a 10 day suspension, with all 10 days conditionally stayed for a period of one year, provided no further cause of discipline arises during that period. Subsequent to the hearing, the Department issued notice that it did not adopt the proposed decision. The Department ultimately reversed course, and issued its decision on October 16, 2018 adopting the ALJ's proposed decision.

Appellant filed a timely appeal contending: (1) the Department ignored evidence that the decoy's appearance violated rule 141(b)(2)[3], and; (2) improperly shifted the burden to appellant (whose clerk did not testify) to establish a defense under rule 141(b)(2). These issues will be discussed together.

DISCUSSION

ISSUE CONCERNING DECOY'S APPEARANCE

Appellant contends that Department failed to consider "all available indicia of age" in concluding that the decoy exhibited an appearance generally expected of a person under the age of 21. (AOB at p. 5.) Specifically, appellant maintains that the Department "ignored the impact on the apparent age of the minor decoy that would be manifest through training and experience received as a senior explorer with the police department." (*Id.* at p. 5.) Further, appellant argues that the Department improperly

[3]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

shifted the burden to appellant's clerk to disprove compliance with 141(b)(2), and/or made improper inferences based on the fact that the clerk did not testify at the hearing. (*Id*. at pp. 5-8.) This represents the Board's best attempt at interpreting appellant's contention that the ALJ shifted its "fact finding responsibility to a non-appearing witness" and "[t]he responsibility of accessing apparent age based upon all factors available was relinquished by the actual trier of fact and placed on the shoulders of seller Bravo [the clerk]." (AOB at pp. 5, 7.)

Rule 141(b)(2) provides:

> The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and *appellant* has the burden of proving that the minor decoy operation failed to comply with 141(b)(2). (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004)

118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

In short, when findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the Department's findings. (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].) The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

Here, the Department adopted the following findings regarding the decoy's appearance:

> 4. James Murphy was born on August 6, 1997. He served as a minor decoy during an operation conducted by the Kern County Sheriff's Department on June 13, 2017. On that date he was 19 years old.
>
> 5. Murphy appeared and testified at the hearing. On June 13, 2017, he was 6' tall and weighed 150 pounds. He wore a gray t-shirt, tan pants, and black and white tennis shoes. (Exhibits 3-4.) His appearance at the hearing was the same.
>
> [¶ . . . ¶]
>
> 10. Murphy appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on June 13, 2017, Murphy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Bravo.

(Findings of Fact, ¶¶ 4-5, 10.) Based on these findings, the Department adopted the ALJ's Conclusions of Law, which addressed appellant's rule 141(b)(2) arguments:

> 5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)[fn] and 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Murphy was tall, had a receding hairline, and had a mature demeanor (specifically describing his time as an Explorer and the number of operations in which he participated). This argument is rejected–Murphy's appearance was consistent with that generally expected of a person under the age of 21. (Findings of Fact ¶ 10.) There is no evidence that his training or experience had any impact upon his appearance or behavior, particularly in the absence of any testimony from Bravo. Additionally, while Murphy has a high forehead, there is no evidence that his hair is receding. Hairlines vary from person to person and there is no evidence that Murphy's hairline has changed in any way.

(Conclusions of Law, ¶ 5.) The Board concurs with the ALJ's assessment.

This Board has noted that:

> An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Here, the ALJ reasonably found the decoy met the 141(b)(2) standard in Findings of Fact paragraphs 4-5, and 10, and Conclusions of Law paragraph 5. His findings and conclusions were neither arbitrary nor capricious.

The Board has also, on innumerable occasions, rejected the "experienced decoy" argument. As the Board previously observed:

> A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

Appellant presented no evidence that the decoy's experience or demeanor *actually resulted* in him displaying the appearance of a person 21 years old or older on

the date of the operation in this case. As the ALJ notes, the clerk did not testify. We cannot know what went through the clerk's mind in the course of the transaction, or why she made the sale — in spite of looking directly at the decoy's driver's license, which showed him to be 19 years of age. Absent some evidence to establish that the decoy's training or demeanor was the *actual reason* the clerk made the sale, these arguments must fail.[4]

In a similar way, the Board rejects appellant's contention that the Department improperly placed the burden on the shoulders of appellant's clerk or that it made any improper inferences regarding her absence from the hearing. As stated above, *appellant* has the burden of establishing a defense under 141(b)(2). Regardless of whether appellant's clerk testified, appellant still had the burden of offering evidence to establish a 141(b)(2) defense. The Department found that appellant failed to meet its burden, noting that there was "no evidence that [the decoy's] training or experience had any impact upon his appearance or behavior." The reference to "the absence of any testimony from [the clerk]" simply suggests one way that appellant could have offered such evidence. This is not improper.

Ultimately, appellant is asking this Board to second guess the Department and reach a different conclusion, despite substantial evidence to support the findings in the decision. This the Board cannot do.

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[4]Although the clerk did not testify, there was evidence in the record that she spoke to detectives, telling them that she always checks ID and that it was her first day. (Findings of Fact, ¶ 7.) Notably, the clerk did not say anything to detectives about the decoy's appearance.

ORDER

The decision of the Department is affirmed.[5]

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq*.